Supreme Court, U. S.
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1799

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 53 OF OKLAHOMA COUNTY, OKLAHOMA, a public body corporate,

Petitioner,

VERSUS

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 52 OF OKLAHOMA COUNTY, OKLAHOMA, a public body corporate; LESLIE FISHER, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF OKLAHOMA; E. H. "HACK" McDONALD, ASSISTANT STATE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF OKLAHOMA; J. PHILLIP WHITE, COUNTY SUPERINTENDENT OF SCHOOLS, OKLAHOMA CITY; JAMES R. PARKER and ALLEN AUSTIN, On Behalf of Themselves and All Others Similarly Situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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June, 1976

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TABLE OF CONTENTS

	PAGE
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case	4
1. The Decision of the District Court	9
2. The Decision of the Court of Appeals	10
Reasons for Granting the Writ	10
Conclusion	17

APPENDIX

Opinion of United States Court of Appeals affirming judgment of United States District Court	i-vi
Memorandum Opinion of United States District Court for the Western District of Oklahoma	vii-xx
Minute Order of United States District Court for the Western District of Oklahoma	xx
42 U.S.C. 1983	xxi
70 Oklahoma Statutes 7-1	xxi
70 Oklahoma Statutes 7-101	xxi
Opinion of the Supreme Court of the State of Oklahoma (Haller v. Austin, 487 P.2d 1360)	xxii-xxvii
Order of the Supreme Court Denying the Petition for Rehearing (Austin v. State Board of Education, 497 P.2d 218)	xxvii-xxxiv

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION:

14th Amendment, Section 1 3

STATUTES:

28 U.S.C. 1254 2
28 U.S.C. 1343 5
42 U.S.C. 1983 ..... 3, 4, 10, 13
70 O.S. 7-1 ..... 4, 6, 11, 13
70 O.S. 7-101 ..... 4, 8

CASES:

Adickes v. Kress & Company, 398 U.S. 144, 26 L.Ed.2d 142 13
Austin v. State Board of Education, 497 P.2d 218 7
Brewer v. Hoxie School District 46 (C.A. 8th 1956), 238 F.2d 91 ..... 13, 14
Brown v. The Board of Education of Topeka, 347 U.S. 483, 98 L.Ed. 873 ..... 10, 14, 15
Burleson v. County Board of Election Commissioners of Jefferson County, 308 F.Supp. 352, aff'd 432 F.2d 1356 16
Cooper v. Aaron, 358 U.S. 1, 3 L.Ed.2d 5 ..... 11, 12
Dowell v. School Board of Oklahoma City Public Schools, 219 F.Supp. 427 4-5
Haller v. Austin, 487 P.2d 1360 7
Smith v. Texas, 311 U.S. 128, 85 L.Ed. 84 12
U. S. v. Scotland Neck Board of Education, 407 U.S. 484, 33 L.Ed.2d 75 16
Wright v. Council of City of Emporia, 407 U.S. 451, 33 L.Ed.2d 51 ..... 14, 15, 16

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Petitioner,

VERSUS

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 52 OF OKLAHOMA COUNTY, OKLAHOMA, a public body corporate; LESLIE FISHER, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF OKLAHOMA; E. H. "HACK" MCDONALD, ASSISTANT STATE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF OKLAHOMA; J. PHILLIP WHITE, COUNTY SUPERINTENDENT OF SCHOOLS, OKLAHOMA CITY; JAMES R. PARKER and ALLEN AUSTIN, On Behalf of Themselves and All Others Similarly Situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Board of Education of Independent School District 53 petitions for a Writ of Certiorari to review the judgment of the United States District Court for the Western District of Oklahoma and the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. pp. i-vi) is not yet reported.

The opinion and order of the District Court entered denying the Petitioner's Claim for relief (App. pp. vii-xx) is not yet reported. The minute order amending the foregoing is shown at Appendix p. xx.

JURISDICTION

The judgment of the Court of Appeals was entered on March 15, 1976, a Petition for Rehearing was not filed in the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the trial court and the Court of Appeals erred in holding that private citizens through the use of state statutes may split a portion of a school district which is predominantly white from a voluntarily integrated school district and join the adjoining school district where the effect of the election is to establish new lines for school attendance through state law leaving a school district 60% white and 40% black which prior to the changing of the school lines was 80% white to 20% black.

2. Whether the trial court and the Court of Appeals erred in holding that a group of white citizens may deannex themselves from a voluntarily integrated school district operating under a plan of integration approved

by the Department of Health, Education & Welfare where the effect is to deprive the black students and other minorities remaining in the district of a quality education and to segregate the black students in a racially identifiable black school district established by state law.

3. Whether the trial court and the Court of Appeals erred in holding that a group of white citizens which deannexes from an integrated school district using state laws to call an election and establish lines by state law for school attendance where such school attendance lines had not previously existed are not within the purview of 42 U.S.C. 1983.

4. Whether the trial court and the Court of Appeals erred by holding that other state officials and school boards may discharge their constitutional duty to end and/or prevent segregation by maintaining in effect a neutral position.

5. Whether the trial court and the Court of Appeals erred in applying a standard of ability to operate an integrated school system after a loss of a substantial portion of the white population from the district rather than the effect on those remaining in the district.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the 14th Amendment to the Constitution of the United States provides as follows.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 42 U.S.C. Sec. 1983 is set out in Appendix page xxi, 70 O.S. 7-1, set out in Appendix page xxi, 70 O.S. 7-101 is set out in Appendix page xxi.

STATEMENT

The Petitioner, Board of Education of Independent School District 53, a public body corporate, will be referred to in this Petition as (I-53); the Respondents will be referred to as follows: James R. Parker and Allen M. Austin (Austin and Parker), the Board of Education of Independent School District 52, a public body corporate (I-52), E. H. Hack McDonald, Leslie Fisher, Phillip E. White (state officials).

The area which was formerly a portion of I-53 and annexed itself to I-52 will be referred to as the "affected area." Frequently in the record I-53 is referred to as Crooked Oak District and I-52 is referred to as Midwest City-Del City.

I-53 is located in the Oklahoma City, Oklahoma, metropolitan area. I-53 encompasses approximately six (6) square miles and before January 1, 1971, was comprised of approximately 3,365 students bounded on the east by I-52 and on the other boundaries by I-89, commonly known as Oklahoma City School District, which in the past had operated a completely segregated dual school system;

Dowell v. *School Board of Oklahoma City Public Schools*, 219 F.Supp. 427.

Jurisdiction of the local court was founded on 28 U.S.C. 1343; the plaintiff's affirmative obligations under the Civil Rights Act of 1964 and the 14th Amendment to the Constitution of the United States.

Prior to the school year commencing September, 1969, I-53 was a white school district with a very small enrollment of black students. In the fall of 1969, a housing project was completed by the City of Oklahoma City within the boundaries of I-53 known as Hamilton Courts. The tenants of Hamilton Courts are predominantly black and most of the black student population of I-53 resides in Hamilton Courts. The students of Hamilton Courts are required by state law to attend schools in I-53 unless permitted to attend school outside of the district by a proper application for transfer on an individual basis.

During the school year of 1969-1970, I-53 completed construction of an elementary school, Southern Oaks Elementary School, located one block from the Hamilton Courts housing project (Supp. Record Vol. I, Plaintiff's Exhibit "1," page 1). On March 5, 1971, following a visit by the Department of Health, Education & Welfare (HEW) on February 25 and 26, 1971, I-53 was notified it was currently operating an elementary school, Southern Oaks Elementary, which was identifiable as a Negro school in that 85.9% of the enrollment was Negro, while the Negro enrollment in the district was only 13.7%. That five of the Negro teachers of I-53 or 62.5% of the Negro faculty were assigned to one school, Southern Oaks Elementary School (Supp. Record

Vol. I, Plaintiff's Exhibit "2", page 2) and I-53 was further notified that it was in probable non-compliance with Title VI of the Civil Rights Act. Thereafter, I-53 commenced a course of voluntary compliance to be implemented by the beginning of the 1971-1972 school terms (Supp. Record Vol. I, Plaintiff's Exhibits "5", "7" and "9", pages 4, 6, 8) and on August 1, 1971, I-53 submitted a desegregation plan (Supp. Record Vol. I, Plaintiff's Exhibit "3", page 3) which was approved by HEW August 13, 1971 (Supp. Record Vol. I, Plaintiff's Exhibit "4", page 4).

On January 1, 1971, I-53 had in its system four elementary schools serving grades one through six as follows: Southern Oaks Grade School, East Oaks Grade School, West Oaks Grade School and Central Oaks Grade School. The junior and senior high schools are located on one campus and all students in I-53 in the junior and senior high school grades attend school on one campus. In March, 1971, Austin and Parker on behalf of themselves and others similarly situated, circulated a Petition to de-annex a portion of I-53 and annex to I-52, pursuant to Title 70 O.S. Sec. 7-1, in force and effect at that time. This provision of the Oklahoma Statutes did not give the receiving district (I-52) any control over the annexation, that is to say, if the election passed, the area involved became by law a portion of I-52. Pursuant to the Petition, an election was held on July 13, 1971, wherein the annexation passed (Supp. Record Vol. I Plaintiff's Exhibit "11" page 10). The area which was de-annexed from I-53 was comprised of a total of 1,360 students with approximately 1,290 of these students being white and 70 black, leaving a large number of black students residing in Hamilton Courts and by law requiring

them to continue to attend school in I-53. Litigation involving the validity and procedural correctness of the election followed in other courts, and the validity of the election insofar as procedural matters was concerned was upheld; see *Haller* v. *Austin*, 487 P.2d 1360 (App. pp. xxii-xxvii). *Austin* v. *State Board of Education*, 497 P.2d 218 (App. pp. xxvii-xxxiv). Commencing with the school year 1972-1973 the students in the annexed area attended school in I-52.

Prior to the opening of Hamilton Courts in 1969, similar election proceedings under state laws were commenced and elections held on June 24, 1959, and May 16, 1969, both of which elections failed to pass resulting in the affected area remaining in I-53. That only after the opening of Hamilton Courts and a large influx of Negro students did an election to de-annex a portion of I-53 pass. I-52, the district which received the affected area as of October 1, 1970, had total membership of 19,252 students, of which 252 were black, being a percentage of 1.2% blacks. The following figures reflect the enrollment in I-53 for the years indicated:

YEAR	AMERICAN INDIAN	BLACK	ASIAN	SPANISH	OTHER	TOTAL
1970-71	209	461	20	58	2,617	3,365
1971-72	129	611	8	58	2,241	3,047
1972-73	61	712	1	39	878	1,691
1973-74	62	753	2	20	752	1,599
1974-75	56	541		23	710	1,330

As can be seen from the figures just presented, between the school years 1971-72 and 1972-73, the white student population (included under other) dropped from 2,241 to 878 because of the election under state law.

During the school year 1971-1972 I-53 operated under the plan of integration submitted to HEW with the opening of I-53 for the school year of 1972-1973, the former students of I-52 residing in the affected area had been transferred to I-52 resulting in a loss of approximately 1,300 white students and 70 black students at one time. As far as student population goes, the effect of carving out the 1,300 students from I-53 left a population of 878 students denominated other which includes white, 39 Spanish, 1 Asian, 712 black and 61 American Indian.

In 1971 the Legislature of the State of Oklahoma amended the existing school law regarding annexation which required subsequent to its effective date of July 2, 1971, the consent of the Board of Education of the losing district in an annexation election and the consent of the receiving district in an annexation election, 70 O.S. 7-101 (App. p. xxi). On July 12, 1971, subsequent to the effective date of the amendment to the annexation law the Board of Education of I-52 adopted the policy that it would not consent to the annexation as a receiving district of any additional territory (R. App. 206). On July 6, 1972, I-52 considered the proposal from I-53 that the balance of the district of I-53 not involved in the annexation election be annexed to I-52 (R. App. 148).

As a result of the loss of the large segment of the white population, I-53 is now and has been since the opening of school in the school year 1972-1973 racially identifiable as a black school district. As a result of the loss of the large white segment, the average percentile score of the grade school students in the district has fallen below the national average, as the students residing in the Hamilton Court

project are from low income, culturally deprived families (R. App. 82).

The loss of the students has had a substantial adverse effect on the quality of the education available to those remaining in I-53 in that the following courses were eliminated from the curriculum: chemistry, physics, biology, advanced math, drama, foreign language and music because of the lack of students available to take these courses, thereby depriving black students remaining in I-53 of obtaining these courses in I-53 if they desire (R. App. 115).

The grade schools have lost financial and parental support associated with the cultural activities of the grade school such as P-TA, the morale of the students has been lowered by the implied stigma of racial inferiority brought about by the large number of white students leaving I-53.

The result of the election and the subsequent loss of the affected area was to erect new boundary lines for the purpose of school attendance under state law when no such lines had previously existed.

The loss of the students in the affected area resulted in a lowering in the quality of education now available to the students now remaining in I-53.

1. The Decision of the District Court

In the Complaint filed November 18, 1971, I-53 alleged that Austin and Parker on behalf of themselves and all others similarly situated were interfering with the operation of I-53, a desegregated school district in Oklahoma County, by calling a successful election to de-annex an area

substantially occupied by white persons from I-53 and to become a part of the adjoining district I-52. The plaintiffs sought an order setting aside the election and restoring the boundary lines as they existed prior to the enforcement of the election. Trial was held before the court without a jury on the issues to be determined. After hearing the evidence, the court entered its findings of fact and conclusions of law, which found that the acts of Austin and Parker were not state action under 42 U.S.C. 1983 and that such acts did not dismantle an integrated school system and no Constitutional violations existed.

2. The Decision of the Court of Appeals

On appeal by I-53, the Court of Appeals affirmed the decision of the trial court. The Court held that the acts of Austin and Parker were not acts contemplated within 28 U.S.C. 1983, that no Constitutional rights had been violated and that the acts of Austin and Parker did not dismantle an integrated school system.

REASONS FOR GRANTING THE WRIT

This case raises significant questions with respect to the right of school patrons to secede from a school district and avoid the requirements of the 14th Amendment. The Oklahoma law at the time this action arose provided a method by which a large segment of the school district could remove itself from one district to another district under state law. The use of this law to escape the mandate of *Brown* provides a tool by which whites in a school district having a substantial black student population may

carve out a portion and annex an area predominantly white and in so doing to mask the true purpose by divising other justification; *Cooper* v. *Aaron*, 358 U.S. 1, 17; 3 L.Ed.2d 5, 16.

The trial court with the Court of Appeals affirming found that Austin and Parker at no time acted in concert with state officials who are charged with administering the laws relating to the changing of school district boundaries. The court also found that no state official named as a defendant or their predecessors acted in any manner to encourage or facilitate the transfer of the affected area except as required by statute and/or court orders. This concept on the part of the trial court and Court of Appeals completely overlooks the fact that the courts of the State of Oklahoma enforced these state laws. Austin and Parker were the persons who set in motion the procedures required to transfer the affected area under *state law* by circulating a petition which resulted in an election and the loss of the affected area to I-52. The state officials and I-52 maintained a neutral position throughout the entire procedure with the exception of I-52 where the evidence shows that a motion or an informal proposal was presented to the Board of I-52 that it take all of I-53 into its district, which it refused to do. By statute in Oklahoma, two groups have been clothed with the authority by the State of Oklahoma to initiate procedures for calling an election and those two bodies are, (1) a majority of the school district electors in the territory proposed to be annexed; and (2) the Board of Education of the district in which the affected area is situated. By the act of Legislature of the State of Oklahoma, Austin and Parker representing the majority of the school district electors in the territory proposed to be

annexed, had the authority under state law to circulate a petition for annexation which they did and which ultimately resulted in the loss of the students and a portion of the school district. If it had not been for this specific legislative enactment of the State of Oklahoma, Austin and Parker, and the class they represent (the electors in the affected area), would have no authority to circulate a petition which would result in I-53 losing the affected area. If it were not for this provision of the Oklahoma law, the students in the affected area could not attend school outside the district, except by individual application. The 14th Amendment plainly prohibits the State from discriminating because of race. Likewise, the 14th Amendment does not forbid Austin and Parker as *private parties* to discriminate on the basis of race in their personal affairs as an expression of their own personal feeling so long as they are not acting against the backdrop of state involvement. The State of Oklahoma may not simply ignore the racial consequences of that passage of 70 O.S. 7-1 for it has long been settled that what the 14th Amendment prohibits is racial discrimination "whether accomplished ingeniously or ingenuously," *Smith* v. *Texas*, 311 U.S. 128, 132, 85 L.Ed. 84, 87; *Cooper* v. *Aaron*, 358 U.S. 1, 3 L.Ed.2d 5. Oklahoma provided the machinery by state law (70 O.S. 7-1) whereby Austin and Parker and other persons similarly situated may discriminate on the basis of race by utilizing state law and permitting the State to maintain a completely neutral position. Admittedly, the active involvement of state officials in the action is not substantial in this case, however, by the State's inaction the result is just as discriminatory, that is new lines were established by Austin and Parker through state action

for school attendance as persons residing within the new boundaries of I-53 cannot attend outside the boundaries under the state law except on individual application. It is clear that to the extent 70 O.S. Sec. 7-1 authorized and empowered private citizens to discriminate on the basis of race, it cannot pass muster under the 14th Amendment and 42 U.S.C. 1983, see *Adickes* v. *Kress and Company*, 398 U.S. 144, 26 L.Ed.2d 142.

I-53 proceeded in the trial court and in the Court of Appeals on the theory that it has a Constitutional duty to protect the Constitutional rights of those persons remaining in the district regardless of whether the acts of Austin and Parker are considered state action under 42 U.S.C. 1983.

There is no dispute that in February, 1971, HEW found that I-53 was operating a segregated elementary school. There is also no dispute that in the spring of 1971, when Austin and Parker were circulating the petition I-53 was taking steps to eliminate and dismantle a segregated school in its district. The trial court and the Court of Appeals completely ignored the principle adopted in *Brewer* v. *Hoxie School District #46* (C.A. 8th 1956), 238 F.2d 91. The *Brewer* Court at page 100 announced the following principle: "It is no less true, of course, that the existence of a Constitutional duty also presupposes a correlative right in the person upon whom the duty is imposed to be free from direct interference with his performance." I-53 has continuously maintained its position that it may seek the aid of Federal Courts to restrain the defendants in this action from de-annexing regardless of whether they are persons within 42 U.S.C. 1983. In declaring the supreme law of the

land in *Brown* v. *The Board of Education of Topeka*, 347 U.S. 483, 98 L.Ed. 873, the affirmative duty was placed upon school boards to end state supported segregation. In delivering this mandate to local school officials, it was not intended to leave them without remedies whenever those Constitutional duties were challenged and hence the principles announced in *Brewer* v. *Hoxie, supra.*

The trial court and the Court of Appeals applied a completely erroneous concept in deciding this case. Whether a large segment leaves a district to join an adjoining district, or whether a new district is formed does not seem to be the test which was announced in *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 33 L.Ed.2d 51. Nor is the test the ability of the remaining district to operate a fully integrated system. The effect is obvious and the Court quoted from the opinion of Judge Winter dissenting in the Court of Appeals in the *Wright* case, *supra*:

> "If the establishment of an Emporia school district is not enjoined, the black students in the county will watch as nearly one-half the total number of white students in the county abandoned the county school for a substantially whiter system."

This is precisely the situation that occurred in this case. The black students remaining in the district watched as over one-half of the white students in I-53 left to attend I-52, a substantially whiter system.

The burden placed upon I-53 by the Court of Appeals is inconsistent with the decision of *Wright, supra,* in that the court failed to examine the effect upon those remaining in the district. In this case the effect on those remaining

in the district was to lower the educational standard, reduce the number of advance classes, deprive a school system of its leadership and by state law confine the black students to a certain area in addition to the racial disparity which was created. The trial court and the Court of Appeals in affirming found all these to be fact, however, it then departed from the doctrine of *Wright* v. *City of Emporia, supra,* by stating that the district had adapted its educational process to fit the needs of those remaining in the district. To adopt the reasoning of the trial court and the Court of Appeals opens up an unlimited number of possibilities to thwart the decision of *Brown* v. *Board of Education of Topeka, supra.* The trial court and the Court of Appeals have departed from the basic concepts of *Brown* v. *Board of Education.* It is inescapable that the holding of an election and removing a certain area of I-53 by state action established new lines which had not previously existed for school attendance permitting the practically all white affected area to attend the school district with a very low percentage of blacks and confining the blacks remaining in I-53 to that area by state law. This is precisely the evil which Brown determined to do away with and which existed in the United States at the time. Certainly the Supreme Court and the other Circuits of this nation have not anguished over this doctrine for so many years as to permit the Tenth Circuit Court of Appeals to adopt a doctrine inconsistent with that of *Brown* and to foster a return to segregated schools under the guise of the unconstitutional doctrine of separate but equal. The trial court stated, "Plaintiff has properly adapted its curriculum to best serve its students," an obvious reference to the culturally de-

prived black students remaining in the district. This statement is supportive of the now unconstitutional doctrine of separate but equal in the field of public education. The courts have consistently struck down splinter public school districts and other methods where the community was subject to a desegregation which order accomplished indirectly what the law had forbidden to be accomplished directly; *Cooper* v. *Aaron*, 358 U.S. 1, 3 L.Ed.2d 5; *Burleson* v. *County Board of Election Commissioners of Jefferson County*, 308 F.Supp. 352, *affirmed* 432 F.2d 1356. This Court struck down the primary purpose test in the cases of *Wright* v. *Council of the City of Emporia and U. S.* v. *Scotland Neck Board of Education*, 407 U.S. 484, 33 L.Ed.2d 75. The Tenth Circuit Court of Appeals has adopted a test which we respectfully submit is just as innocuous and with as many pitfalls as those previously overruled by this Court and that is "the ability to operate an integrated system in the remaining portion of the district" adapted to the needs of those black students remaining in the district. The decision of the Court of Appeals is clearly at odds with all of the concepts enunciated by this Court. Any school district may lose a portion of its district, may split up the district into splinter districts and still operate a fully integrated system within the remaining district. Any district can adopt its curriculum to those students remaining in the district. This is not the test and this particular case clearly illustrates the soundness of the decisions of *Wright* and *Scotland Neck* in stating that the test to be applied, among others, is the effect upon those remaining in the district to obtain a quality education.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NUMBER 53 OF OKLAHOMA COUNTY, OKLAHOMA, A PUBLIC BODY CORPORATE, Plaintiff-Appellant,	)	
v.	)	No. 75-1337
BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NUMBER 52 OF OKLAHOMA COUNTY, OKLAHOMA, A PUBLIC BODY CORPORATE, et al., Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA
(D.C. No. Civil 71-728)

Leslie L. Conner and James M. Little of Conner, Little & Conner for Plaintiff-Appellant.

Barney W. Miller of Miller, Granger and Hamilton for Defendants-Appellees.

Before McWILLIAMS, BREITENSTEIN and BARRETT, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This civil rights action relating to the transfer of territory from one school district to another is before the court for the third time. We reversed Nos. 72-1094 and 73-1225 on procedural grounds. After the second remand the case was tried by another Judge. The controversy has twice been before the Oklahoma Supreme Court. See Haller v. Austin, Okl., 487 P.2d 1360, and Austin v. State Board of Education, Okl., 497 P.2d 218. After an evidentiary hearing, the trial court made comprehensive findings of fact and entered judgment against the school district from which the territory had been taken. We affirm.

Plaintiff-appellant is Board of Education of Independent School District No. 53 of Oklahoma County, Oklahoma (Crooked Oak District). The defendants-appellees are Board of Education of Independent School District No. 52 of Oklahoma County, Oklahoma (Midwest City District), Fisher and McDonald in their official capacities as Superintendent and Assistant Superintendent of Public Instruction for the State of Oklahoma, White in his official capacity as County Superintendent of Schools, and Parker and Austin as individuals. Upon petitions circulated by Parker and Austin and others an election was held pursuant to Oklahoma statutes which are not here attacked. The election favored the deannexation of the affected area from Crooked Oak and its annexation to Midwest. The election procedures were approved in Haller, 487 P.2d 1360, 1362. In Austin v. State Board of Education, 497 P.2d 218, 221, the Oklahoma school officials were "directed to proceed to perform their statutory duties and thereby so implement the annexation that it shall become full (sic.) effective on July 1, 1972." Crooked Oak brought suit under 42 U.S.C. § 1983 in federal

court asserting an affirmative constitutional obligation to protect its integrated school district and the rights of the persons in its district.

In Adickes v. Kress & Co., 398 U.S. 144, 150, the Supreme Court said that two elements are essential to recovery under § 1983. First, the plaintiff must prove deprivation of a right secured by the Constitution and laws of the United States. Second, plaintiff must show that defendant "acted under color of law." We consider the two elements in the order stated.

Before the transfer Crooked Oak district embraced about six square miles. It was bounded on the east by Midwest and on the other sides by the Oklahoma City School District. Until after the decision in Brown v. Board of Education of Topeka, 347 U.S. 483, Crooked Oak operated segregated schools. At all times since its organization in 1942 Midwest has operated integrated schools.

In the fall of 1969 the City of Oklahoma City completed a low-income housing project, Hamilton Courts, within the boundaries of Crooked Oak. The Hamilton Courts tenants are predominantly Black and the children are required to attend schools in Crooked Oak unless, upon application, a transfer is permitted to another district.

Crooked Oak operated one senior high school, one junior high school, and four elementary schools. One of the elementary schools, Southern Oak, was located adjacent to Hamilton Courts and in 1971 was identifiable as a Black school. In compliance with HEW guidelines Crooked Oak adopted an approved integration plan which was operative in the 1971-1972 school year. During that school year Crooked Oak had 3407 students of which 611 were Black and 198 were from other minorities.

As the result of the transfer Midwest received 1361 students from the affected area, of which 70 were Black. Before the transfer Crooked Oak had a Black enrollment of

about 20% and this was increased to about 42% after the transfer.

Pursuant to petitions circulated by school patrons elections were held in 1959 and 1969 for the annexation of the affected area to Midwest. In each, annexation was defeated. A 1971 election approved the annexation. The Oklahoma law at that time did not require the approval of either district to the annexation. In 1972 the law was changed, 70 O.S.A. § 7-101, to require the consent of both the annexing and deannexed districts before an election could be held. Thereafter Crooked Oak tried unsuccessfully to get Midwest concurrence to a consolidation of the two districts. As a result of the voluntary failure of Crooked Oak to comply with HEW guidelines, Southern Oak elementary school was an identifiable Black school at the time of trial.

Crooked Oak alleged in its complaint that the transfer would cause it to lose a large portion of its tax base. The evidence is to the contrary. At the time of trial the tax base per pupil in Crooked Oak exceeded that in Midwest. The trial court found that the transfer has not affected "the money available to operate the Crooked Oak schools for the benefit of the students who remain in the district."

Crooked Oak asserts that the transfer of the affected area has resulted in the dismantling of an integrated system and, hence, violates the principles announced in Wright v. Council of the City of Emporia, 407 U.S. 451. In Wright, shortly after a district court desegregation decree a separate school system was carved out of a larger district to which the desegregation order applied. The court held that "establishment of a separate system would actually impede the process of dismantling the existing dual system." Ibid. at 466. The trial court in the case at bar found that Crooked Oak "was not racially identifiable as a Black school district either before or after the transfer." Also during the school year preceding the transfer Crooked Oak "operated a fully

integrated school system." No problem exists with regard to the one senior and one junior high schools. The district court found that integration of the elementary schools "poses no problem which it [Crooked Oak] could not overcome had it the desire or motivation to do so." The transfer of the affected area did not dismantle an integrated system in Crooked Oak. Its system was integrated before and after the transfer, and is now fully capable of operation as an integrated system.

Crooked Oak says that the transfer caused it to alter its curriculum to eliminate certain college preparatory courses. It did this because of lack of demand and to adopt a curriculum best suited to its students. Evidence for Crooked Oak showed that the socio-economic levels of the students from its remaining territory was less than those in the affected area and had resulted in a drop in "educational percentile ratings." Curriculum changes and loss in ratings present no constitutional problems. There is no showing that any student who desired courses available in another district was denied a transfer. Crooked Oak has not established that either it, or any person living within its district, has lost any constitutional right by reason of the transfer.

The second element of § 1983 requires action under color of state law. The record shows that Midwest did nothing to accomplish the transfer of the affected area to its district. It did not seek or promote the transfer and under Oklahoma law it could not prevent it. Midwest took no action that would bring it within the purview of § 1983.

The state and county school officials had no part in the circulation of the transfer petitions nor in the election. The acts which they performed to carry out the result of the election were ministerial only and were not performed until after the Oklahoma Supreme Court ordered them to act. See Austin, 497 P.2d at 221. They did nothing to bring themselves within the purview of § 1983.

Defendants Austin and Parker, as individuals, circulated petitions for the transfer of the affected area to Midwest. In so doing they did not act jointly or in concert with the State of Oklahoma, with any of its officials or agents, or with Midwest. Austin and Parker did only what the Oklahoma statutes gave them a right to do as individuals. Adickes says, 398 U.S. at 152, that one need not be a state officer to act under color of law and that it is enough if he "is a willful participant in joint activity with the State or its agents. United States v. Price, 383 U.S. 787, 794." In the instant case we have no compulsion or command by the state to discriminate. Resistance by state and county officials to the actions by Austin and Parker is shown by the fact that those officials twice took and lost appeals to the Supreme Court of Oklahoma and did not act until that court ordered them to. See Haller, 487 P.2d at 1362, and Austin, 497 P.2d at 221. Austin and Parker utilized procedures authorized, but not compelled, by state law. In so doing they did not engage in any joint activity with either the state, its officials, or its agents. The § 1983 requirement of "color of law" has not been met.

Affirmed.

FILED
MAR 31 1975
REX B. HAWKS
CLERK, U. S. DISTRICT COURT
by VERA EDDLEMAN
DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 53 OF OKLAHOMA COUNTY, OKLAHOMA, a public body corporate,

Plaintiff,

-vs-

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 52 OF OKLAHOMA COUNTY, OKLAHOMA, a public body corporate,

LESLIE FISHER, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF OKLAHOMA,

E. H. "HACK" McDONALD, ASSISTANT STATE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF OKLAHOMA,

J. PHILLIP WHITE, COUNTY SUPERINTENDENT OF SCHOOLS, OKLAHOMA CITY,

JAMES R. PARKER and ALLEN AUSTIN, on behalf of themselves and all others similarly situated,

Defendants.

Case No. CIV-71-728

MEMORANDUM OPINION

This litigation arises from the deannexation of an area (the affected area) formerly a part of Plaintiff's Independent School District I-53 (Crooked Oak) and its annexation to Independent School District I-52 (Midwest City). The process was accomplished in accordance with the laws of the State of Oklahoma. The affected area was transferred from the Crooked Oak District to the Midwest City District on July 1, 1972 pursuant to order of the Oklahoma Supreme Court upon a finding that applicable State laws had been followed in the deannexation process. *Austin* v. *State Board of Education*, 497 P. 2d 218 (Okla. 1972).

The instant action is a civil rights case in which Plaintiff contends that it has an affirmative constitutional obligation to protect its integrated school district and the rights of the persons in its district. It contends that the deannexation election had the effect of violating constitutional rights by dismantling an integrated school district. Plaintiff seeks restoration of its school district boundaries to their location prior to the transfer in order to reacquire the affected area notwithstanding the deannexation.

Defendants Fisher, McDonald, and White were joined in the action based on their official capacities in administering school district boundary changes pursuant to State law. These parties have taken a generally neutral position in this litigation.

Defendant Board of Education of Independent School District I-52 (Midwest City) which district received the affected area urges that it did not encourage the deannexation effort and denies that it has taken any action intending to result in the dismantling of an integrated school district. It further states it has at all times since its inception in 1942 operated an integrated school system and that it presenly operates an integrated system in full compliance with appropriate guidelines.

Defendants Parker and Austin were school patrons in the affected area who participated in circulating the initiative petition and acted as proponents at the time of the election. They assert their motives arose from a belief that their children would receive a better education in the Midwest City district. These Defendants deny that they worked with any governmental officials at any level to include state or local officials and state that they have been opposed at all levels in their efforts.

Jurisdiction in this action was found to exist by the Court of Appeals for this Circuit in its unpublished opinion of November 13, 1972 pursuant to 28 U.S.C. §1343(c). Said Court also entered an opinion in this case on August 30, 1973 holding that improper procedures had been followed in the granting of a Motion for Summary Judgment. Both of said appeals followed rulings of another Judge of this Court. After the second remand of the case the assigned Judge transferred the case to the undersigned Judge. In the first of said Opinions, the Court of Appeals stated:

> ". . . The Supreme Court has held that the realignment of school districts may be enjoined when it would impede the process of dismantling a segregated school system. Wright v. Council of City of Emporia, 407 U.S. 451, 470. The same remedy is available when the effort is to dismantle an integrated system in alleged violation of Fourteenth Amendment rights."

The parties agreed to certain relevant facts which were incorporated in the Pre-Trial Order. The first agreed fact was that Crooked Oak was operated as an all white segregated system prior to 1954 when *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 868, 98 L.Ed. 873 (1954) was decided. The second agreed fact was that the annexation election was procedurally valid and the affected area was transferred to Midwest City on July 1, 1972. It was further agreed that the school patrons in the affected area had voted against deannexing from Crooked Oak and join-

ing Midwest City in 1959 and again in 1969. The parties also agreed that the opening of a public housing project in the Crooked Oak district known as Hamilton Courts resulted in a substantial number of black students moving into and attending schools in Crooked Oak and that prior to the opening of this project virtually no blacks attended schools in Crooked Oak.

Crooked Oak at all times has operated only one senior highschool and one junior highschool. Prior to 1969, the district operated three elementary schools. West Oak was and is located in a well developed housing area located in the western portion of the district to the west of an expressway which traverses the district. The West Oak attendance area encompassed this area. East Oak was located in the affected area which is a well developed housing area located along the west edge of Del City,[1] a suburb of Oklahoma City. The attendance zone of East Oak primarily included the affected area. The third elementary school was Central Oak located at the main campus along with the Junior and Senior Highschools. The original Crooked Oak district was approximately 2½ miles square containing approximately 6 square miles.[2] The central portion of the district does not contain any large residential developments and can be described as a sparsely populated area containing many industrial tracts and a public park over one square mile in size. The Central Oak attendance area generally encompassed this sparsely populated area.

The Hamilton Courts project was built in the eastern part of the sparsely populated area and west of the affected area. A fourth school was constructed in the Crooked Oak district adjacent to Hamilton Courts which school was

[1] Most of the town of Del City has always been located in the Midwest City School District with the primary exception being the affected area along its west boundary.

[2] A quarter section of area had been carved out of the west edge of the district for an unknown reason.

called Southern Oaks. This school opened during the 1969-1970 school year and its attendance district was primarily the Hamilton Courts project area.

During the spring of 1971, at about the time Defendants Parker and Austin were circulating the initiative petitions which eventually culminated in the affected area being transferred to Midwest City, officials of Crooked Oak were notified by officials of the United States Department of Health, Education, and Welfare (HEW) that Crooked Oak was in probable non-compliance with Title VI of the Civil Rights Act. One basis for this notification was that the Southern Oak Elementary School was identifiable as a black school[3] having a black enrollment exceeding 85% while the district as a whole had a black enrollment of less than 14%. The evidence discloses that a desegregation plan was presented and approved and Crooked Oak operated in compliance with HEW civil rights guidelines during the 1971-1972 school year at which time they had 3407 students of which 611 were black and 198 represented other minorities. Crooked Oak was a fully integrated system during school year 1971-1972.

After the deannexation which became effective July 1, 1972, the total enrollment in the Crooked Oak district for the school year 1972-1973 dropped to 1691 of which 712 were black and 101 represented other minority groups. The figure submitted for the current school year 1974-1975 shows the total enrollment has dropped even further to 1330 students and that the number of black students has also declined to 541 while other minorities included 79 students.

[3] The evidence at the time of the trial disclosed that Plaintiff has again allowed this school to become identifiable as a black school due to it having a virtually all black enrollment. This raises a serious question as to whether Plaintiff appears in this equitable action with "clean hands." This situation is caused by Plaintiff failing to voluntarily comply with guidelines established according to the Civil Rights Act.

Crooked Oak had a black enrollment of approximately 20% prior to the deannexation which increased to approximately 42% following same.[4] The percentage is a little over 40% for the current school year.

The evidence discloses that in the fall of 1972, the Midwest City district received 1361 students from the affected area and that 70 of these were black.

The East Oak Elementary School is the only facility of the Crooked Oak District located in the affected area. Negotiations were entered into with the Midwest City District concerning a transfer of this facility to the receiving district but an agreement could not be reached. In this regard, evidence was presented that informal talks were conducted concerning a merger of the Crooked Oak District into the Midwest City District. Such talks are irrelevant and immaterial to the issues herein. At the time of trial, Crooked Oak was renting the East Oak facility to a private group for special educational purposes.

Plaintiff in its Complaint set out contentions relating to a necessary decrease in the number of teachers and supporting personnel due to the transfer of the affected area. Such contentions were not reurged in the Pre-Trial Order and have thus been abandoned.[5] However, a decrease in teachers and supporting personnel would inevitably result from any deannexation situation bringing about a reduction in school population and area and would be irrelevant and immaterial to the issues herein.

Plaintiff also in its Complaint contended that it would lose a large portion of its tax base by the transfer of the affected area to another school district. This contention also has been abandoned by Plaintiff's failure to reurge it in

[4] Part of this percentage increase is due to the increased number of blacks enrolled.

[5] Local Rule 16(c) provides that the contents of the Pretrial Order supersedes the pleadings.

the Pre-Trial Order.[5] However, evidence was received which showed that the tax base in the Crooked Oak District per pupil during the current school year greatly exceeds that of the Midwest City District. In this regard, the industrial growth within the area probably has caused this situation. In addition, the evidence disclosed that Crooked Oak receives special funds from local, state, and Federal sources because of the large number of students living in public housing which is not on the property tax rolls. It thus does not appear that the transfer of the affected area has affected the money available to operate the Crooked Oak schools for the benefit of the students who remain in the district.

The Plaintiff presented evidence that the curriculum had been altered after the transfer of the affected area to eliminate certain courses which could be considered or described as college preparatory courses. Plaintiff attributes this elimination of courses as being caused by a lack of demand for same by the students remaining in the district. Plaintiff admits that its curriculum had been tailored to include certain courses such as black history, and more remedial courses. It thus seems that Plaintiff has properly adapted its curriculum to serve best its students.

Plaintiff presented evidence that the educational and socio-economic levels of the students in the remaining part of its district are lower than those in the affected area. This of course resulted in a drop in educational percentile ratings in the district. In this regard, Plaintiff has no constitutional guarantee that its students maintain a certain level. Plaintiff has failed to show that the loss of the students from the affected area has caused the students in the remaining area to have lower scores. The influx of students into the district living in public housing appear to have caused the level of the students in the district as a

[5] Local Rule 16(c) provides that the contents of the Pre-trial Order supersedes the pleadings.

whole to decrease prior to the deannexation. The Plaintiff had no constitutional right to prevent the Black students moving into its district from attending its schools based on the fact that its educational level would thereby decrease. It has no more constitutional right to prevent the students in the affected area from attending the schools in their new district for the same reason.

The Court finds that Defendants Parker and Austin as school patrons at no time acted in concert with state officials, to include those made Defendants herein, who are charged with administering the laws relating to the changing of school district boundaries. It was necessary for them to obtain an order of the Supreme Court to require Defendant White's predecessor, W. C. Haller, to call the deannexation election after the petition was circulated. See *Haller* v. *Austin*, 487 P. 2d 1360 (Okla. 1971). It was likewise necessary for them to obtain a writ of mandamus to compel state officials charged with ministerial duties to implement the deannexation order following the election. *Austin* v. *State Board of Education, supra*. Likewise, the Court finds that no public official herein named as Defendants or their predecessors acted in any manner to encourage or facilitate the transfer of the affected area except as required by statute and/or Court orders. The Defendant Board of Education of Independent District I-52 did not actively participate in or encourage the individual school patrons of the affected area to make the transfer. The evidence discloses that Independent School District I-52 (Midwest City) has never operated a segregated school system since it was established in 1942. At the time of the trial, the percentage of blacks in the district was slightly less than 5%.

Plaintiff asserts in its Complaint that it brings this action to enforce rights pursuant to 42 U.S.C. §1983 et seq. and also pursuant to the 1964 Civil Rights Act (42 U.S.C. §§2000 et seq.) In the Pretrial Order it only asserts rights pursuant to 42 U.S.C. §1983. In *Adickes* v. *Kress & Co.*, 398

U.S. 144, 90 S.Ct. 1598, 26 L. Ed. 2d 142 (1970) the Court stated:

> "The terms of §1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.' This second element requires that the plaintiff show that the defendant acted 'under color of law.'"

The contention set out by the Plaintiff in the Pre-Trial Order states:

> "The acts of the defendants Allen M. Austin and James R. Parker in circulating a Petition and obtaining a vote thereon which de-annexed an area from I-53 is a violation of the constitutional rights under the Fourteenth Amendment and the statutory rights of the persons remaining in the district of I-53 and the Board of Education of Independent School District No. 53 has an affirmative constitutional obligation to protect the integrated school district and the rights of the persons in the District of I-53."

Their contentions fail to disclose an allegation of acts on the part of the individual Defendants which deprive any person of any right secured by the Constitution. They do assert that the State school officials have an affirmative duty to "eliminate segregation, prevent the dismantling of an integrated school system" and further that the Board of Education of Independent District I-52 (Midwest City) "is fostering a return to segregated school systems by law in refusing to permit the annexation of the remaining portion of I-53 to I-52 and must discharge its affirmative duties to end segregation and prohibit the dismantling of integrated school systems."

In looking to the rights secured by the Constitution and laws of the United States, it must be determined as stated by our Court of Appeals in its first opinion if the transfer of the affected area from the Plaintiff's district has impeded the process of dismantling a segregated school system pursuant to *Wright* v. *Council of City of Emporia,* 407 U.S. 451, 92 S.Ct. 2196, 33 L.Ed. 2d 51 (1972) or dismantled an integrated system.

The facts in the instant case vary somewhat from those involved in *Wright* v. *Council of City of Emporia, supra.* In that case, a separate school system was created or carved out of a larger system. This act was accomplished two weeks after the United States District Court had ordered the implementation by the larger system of a plan designed to dismantle a system of enforced racial segregation. In the instant case, the Plaintiff district was operating in compliance with guidelines established by HEW prior to the transfer of the affected area and thus was not in the process of dismantling a system of enforced racial segregation. Crooked Oak at that time was a fully integrated school system.

Another factor present in *Wright* v. *Council of City of Emporia, supra,* was that the new district which was created took with it two of the three school buildings which had been used by the larger district and that these buildings were better equipped than the one remaining with the old district. In the instant case, no school buildings have been taken from Plaintiff, and the one in the affected area which it no longer uses for school purposes was primarily utilized by the students in the affected area.

Another factor discussed in the case of *Wright* v. *Council of City of Emporia, supra,* was a disparity in the racial composition of the two systems. However, the Supreme Court stated in regard to this point as follows at p. 464, L. Ed. 2d 62:

> "We need not and do not hold that this disparity in the racial composition of the two systems would be a sufficient reason, standing alone, to enjoin the creation of a separate school district. The fact that a school board's desegregation plan leaves some disparity in racial balance among various schools in the system does not alone make that plan unacceptable. We observed in Swann,[6] supra, that '[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.' 402 U.S., at 24, 28 L. Ed. 2d at 571."

In the instant case, Crooked Oak experienced an increased ratio of Black students following the transfer of the affected district. However, the district as a whole was not racially identifiable as a Black school district either before or after the transfer.

During the school year preceding the transfer (1971-1972) the Plaintiff school district operated a fully integrated school system which was not racially identifiable as a Black system. Following the transfer on July 1, 1972 the Plaintiff school district for school year 1972-1973 operated an integrated school system which was not racially identifiable as a Black system.[7] The Court finds that Crooked Oak was not in the process of dismantling a segregated system when the

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[6] *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.,* 402 U.S. 1, 91 S.Ct. 1267, 18 L. Ed. 2d 554 (1971).

[7] The Court finds that Plaintiff has not acted in good faith in recently discontinuing its voluntary compliance with guidelines set by HEW, and that such non-compliance is not caused by the deannexation and transfer of the affected area. Plaintiff's own witnesses testified that the Crooked Oak district was now capable of operating a fully integrated system. As it had only one Junior and one Senior highschool no problem has ever existed there. Integration within Plaintiff's three elementary schools poses no problem which it could not overcome had it the desire or motivation to do so. The school authorities are apparently waiting for HEW to step in again as to elementary school desegregation.

transfer of the affected area was accomplished. The Court further finds that the transfer of the affected area did not "dismantle" an integrated system. The system was integrated before and after the transfer and is now fully capable of operating an integrated system.

As this Court understands the holding in *Wright* v. *Council of City of Emporia, supra,* wherein the Court stated:

> ". . . We hold only that a new school district may not be created where its effect would be to impede the process of dismantling a dual system."

the situation involved in said case was unique and the Court's holding was limited to the very narrow circumstances involved in said case. In the instant case, a new school district has not been created, and no process of dismantling a dual system has been impeded. The Plaintiff has not suffered constitutional deprivations as set out in *Wright* v. *Council of City of Emporia, supra,* or by any other means.

In considering Plaintiff's burden to establish that its rights have been violated by persons acting under "color of state law" the Court finds that in addition to Plaintiff failing to establish that its constitutional rights had been violated, that it likewise has failed to establish the second element required to prevail under 42 U.S.C. §1983.

Defendants Parker and Austin at all times performed acts as individuals pursuant to procedures provided by the Statutes of the State of Oklahoma to effect the transfer of the affected area. They had a right to so proceed. As noted previously, they did not act in concert with any state official. The standard established in *Adickes* v. *Kress & Co., supra,* was stated to be:

> "To act 'under color' of law does not require that the accused be an officer of the State. It is enough that

> he is a willful participant in joint activity with the State or its agents," (citations omitted).

The actions of Defendants Parker and Austin in question herein were done pursuant to or in conformity with State law procedures. These acts are distinguishable from acting "under color of state law." *Logan* v. *Short,* 342 F. Supp. 1349 (E.D. Mo. 1972; *Weise* v. *Reisner,* 318 F.Supp. 580 (E.D. Wisc. 1970). They did not participate in joint activity with the State of Oklahoma or its agents in their deannexation efforts.

The Court finds that under the evidence Defendant Board of Education of Independent District I-52 (Midwest City) committed no acts in accomplishing the transfer of the affected area to its district and thus was not "acting under color of state law" in regard to the transfer. The Court further finds that under the law this Defendant had no "affirmative duty" or any duty to permit or agree to the annexation of the remaining portion of the Crooked Oak district following the transfer.

The acts of the remaining Defendants were ministerial in nature and were accomplished only pursuant to order of the Oklahoma Supreme Court. It follows that although these persons were state officials, they voluntarily committed no acts to further or effect the transfer of the affected area, which transfer Plaintiff asserts constituted a violation of its rights.

The Court having found that Plaintiff has not been deprived of any constitutional rights by the transfer of the affected area from its school district to the Midwest City district and further that no person actively involved in effecting such transfer was acting under color of state law determines that Plaintiff has failed to meet its burden of establishing its case asserted herein. The action is dismissed as to all Defendants.

Dated this 31 day of March, 1975.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

ENTERED IN JUDGMENT DOCKET
ON 3-31-75

ADELAIDE HOLSTON, DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

Oklahoma City, Oklahoma
Date: 4-15-75

Bd of Education, etc., Plaintiff,	)	
	)	Case No. 71-728 Civil
vs.	)	
	)	
Bd of Education, etc., et al Defendant.	)	

To Rex B. Hawks, Clerk:

Please enter the following minute order in the above entitled case.

The last sentence in the Memorandum Opinion filed herein on 3-31-75 is amended to read: The action should be dismissed as to all Defendants.

Clerk to Notify all attys

s/ Fred Daugherty
United States District Judge

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42 USC 1983

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

70 OKLAHOMA STATUTES 7-1

(a) The territory comprising all or part of a school district may be annexed to an adjacent school district, or to a school district in the same transportation area authorized to furnish transportation, or to two or more such districts, when approved at an annexation election called and conducted by the county superintendent of schools (i) in pursuance of a petition for annexation signed by a majority of the school district electors in the territory proposed to be annexed, hereinafter referred to as the area affected, as provided in this Section, or * * *

70 OKLAHOMA STATUTES 7-101

A. The territory comprising all or part of a school district may be annexed to an adjacent school district, or to a school district in the same transportation area authorized to furnish transportation, or to two or more such districts, when approved at an annexation election called by the county superintendent of schools, but an annexation election may not be held between independent districts unless the boards of education of the annexing and annexed districts concur therein,

1. In pursuance of a petition for annexation signed by a majority of the school district electors in the territory proposed to be annexed, hereinafter referred to as the area affected, as provided in this section, or * * *

W. C. HALLER, Oklahoma County Superintendent of Schools, Plaintiff in Error,
v.
Allen M. AUSTIN and James R. Parker, on behalf of themselves and all others similarly situated, Defendants in Error.

No. 45028.

Supreme Court of Oklahoma.

Aug. 3, 1971.

As Amended on Denial of Rehearing Aug. 25, 1971.

Action for an order directing county superintendent of schools to approve plaintiffs' school annexation petition and to call an election to annex portion of one school district to another. The District Court, Oklahoma County, Robert L. Berry, J., directed superintendent to hold an election, and superintendent appealed. The Supreme Court, Jackson, J., held that where registered but absentee voters in area proposed to be annexed were not attempting to cast their ballots in school annexation election, and it could be assumed that such absentees were not aware that petition to call an election was being circulated, absentee voters could not be considered in determining sufficiency of annexation petition.

District Court order directing superintendent to call an election affirmed and Supreme Court order staying effectiveness of election vacated and set aside.

1. Schools and School Districts Key 38

Notice that petition to call a school annexation election will be circulated is required before an annexation election may be held. 70 O.S.Supp.1968, § 7-1(a).

2. Schools and School Districts Key 38

Where registered but absentee voters in area proposed to be annexed were not attempting to cast their ballots in school annexation election, and it could be assumed that such absentees were not aware that petition to call an election was being circulated, absentee voters could not be considered in determining sufficiency of annexation petition. 70 O.S.Supp.1968, § 7-1; 70 O.S.Supp.1965, § 1-15.

Appeal from the District Court of Oklahoma County; Robert L. Berry, Judge.

Action by Austin and Parker and others similarly situated, as plaintiffs, for an order and judgment directing the defendant, W. C. Haller, Oklahoma County Superintendent of Schools, to approve their school annexation petition and call an election to annex a portion of Crooked Oak School District to the Midwest City School District. From judgment directing the defendant to hold an election, the defendant appeals. Affirmed.

Curtis P. Harris, Dist. Atty., W. L. Funk, Asst. Dist. Atty., and Harry Johnson, Oklahoma City, for plaintiff in error.

Miller, Brockett, Granger & McConnel by Barney W. Miller, Oklahoma City, for defendant in error.

JACKSON, Justice:

70 O.S.Supp.1968, § 7-1, provides that a petition for annexation of a portion of a school district to another school district must be signed "by a majority of the school district electors in the territory proposed to be annexed."

A "school district elector" is defined in 70 O.S.Supp. 1965, § 1-15, as a person—

> "who has resided in the district for at least twenty days and who possesses the qualifications of electors

as defined by the Constitution and Laws of the State. All persons shall be required to be registered with the County Election Board of the county in which such person resides in order to vote in any school or school district election."

On April 5, 1971, Austin and Parker presented to W. C. Haller, Oklahoma County Superintendent of Schools, a petition for the annexation of a portion of Independent School District No. 53 of Oklahoma County (known as Crooked Oak School District) to Independent School Dist. No. 52 of Oklahoma County (known as Midwest City School District). It is admitted that this petition for annexation contained 1047 valid signatures. County Superintendent, Haller, ascertained from the County Election Board that there were 2309 registered voters in the area proposed to be annexed and refused to call an annexation election.

Austin and Parker, for themselves and others as plaintiffs, filed an action in the District Court of Oklahoma County against County Superintendent Haller requesting the court to overrule the order denying the Petition for Annexation and to direct the County Superintendent of Schools to call an annexation election pursuant to their Petition for Annexation. After an evidentiary hearing the trial court found that 272 registered voters in the area proposed to be annexed had moved out of the area and should not be considered in testing the sufficiency of the Petition.

The trial court then subtracted 272 (those who had moved) from 2309 (the number registered) and concluded that 1047 petitioners constituted a majority of the remaining 2037 qualified registered electors remaining in the area sought to be annexed and entered judgment directing the County Superintendent of Schools, Haller, to call an annexation election.

A Petition in Error and Motion to stay the Election were filed in this court on June 21, 1971. On June 28, 1971,

we entered an order refusing to stay the election but stayed the effectiveness of the election until the further order of the court.

The parties have stipulated that the evidence supports the trial court's finding that 272 registered voters had moved out of the area proposed to be annexed. However, County Superintendent Haller, defendant in the trial court and plaintiff in error here, contends that the burden was upon the plaintiffs in the trial court, Austin and Parker, to produce evidence that the 272 electors had left the area permanently and were not intending to return. He correctly states that there is no evidence that any of the 272 registered voters had abandoned their legal residences in the area, or had established any new residence or domicile outside the affected area. He relies upon the presumption that once a residence is established it continues until a new one is established.

In school annexation *election contests* we have held that an individual must have a residence somewhere, "and when once established, it is presumed to continue until a new one is established." Jones v. Burkett (1959), Okl., 346 P.2d 338; Richardson v. Gregg, 144 Okl. 102, 290 P. 190. In the Jones and Richardson cases the presumption was indulged in favor of electors whose right to vote was contested when they appeared at the election to cast their ballots. In those cases they proved their right to vote in election contests following the elections.

[1, 2] In the instant case the 272 absentees were not attempting to cast their ballots or exercise or assert a right of suffrage. The issue when the Petition was circulated was whether an election would be called. Since the law does not require notice that a petition will be circulated we may assume that the 272 absentees were not aware that a petition to call an election was being circulated. It would seem if registered absentees are to be regarded as district electors so as to have an influence upon whether an election will be

called the Legislature would have provided some form of notice that a petition will be circulated. Notice is required before an annexation election can be held. 70 O.S.Supp. 1968, § 7-1(a).

A petition for an election is simply the machinery or method used to place the question before the electors as to whether annexation will be approved. The election call decides nothing, except that an election will be held. The presumption indulged and applied in Jones and Richardson is a rebuttable presumption in favor of suffrage for the voter who is attempting to vote at an election. We do not believe it should be applied, or that the Legislature intended that it should be applied, in determining whether a petition for annexation is sufficient.

It is argued that a valid and sufficient petition is a jurisdictional prerequisite to an order calling an annexation election. We have so held, but we have also held that the court may include a review of the whole record and consider any proper evidence supporting or challenging the sufficiency of the petition. In re Wickstrum (1969), Okl., 454 P.2d 660, 663.

The County Superintendent suggests that the voter registration records of Oklahoma County cannot be collaterally attacked. The "registration records" are not under attack in this case. They were accepted and approved by the County Superintendent and the trial court. The sufficiency of the petition is in question, and in In re Wickstrum we said (p. 663) that a judicial determination of the sufficiency of the petition is an evidentiary proceeding.

We conclude that the trial court did not err in directing that an annexation election be held.

Our attention is invited to House Joint Resolution No. 1019, approved April 13, 1971, suspending all laws of this state authorizing the holding of elections to vote on questions of annexation until July 1, 1971. It is not contended

that this resolution is applicable in this case. Section 1 of the Resolution provides "that this suspension shall not apply to any proceedings which have been initiated, but not completed prior to the effective date of this Resolution." The petition for annexation herein was filed with the County Superintendent of Schools on April 5, 1971. The new Oklahoma School Code became effective on July 2, 1971. H.B. No. 1155, Section 24-128, enacted 1971.

Our order dated June 28, 1971, staying the effectiveness of the election is vacated and set aside, without prejudice to the right of an appeal in the manner provided by law, to the District Court from an order of the County Superintendent of Schools declaring the result of the annexation election.

The order of the Trial Court directing the County Superintendent of Schools to call an election is affirmed.

BERRY, C. J., DAVISON, V. C. J., and WILLIAMS, IRWIN, LAVENDER and McINERNEY, JJ., concur.

Allen M. AUSTIN and James R. Parker on behalf of themselves and others similarly situated,
Petitioners,
v.
STATE BOARD OF EDUCATION et al.,
Respondents.

No. 45344.

Supreme Court of Oklahoma.

April 4, 1972.

Rehearing Denied May 2, 1972.

Petitioners who were among those who circulated petition calling for school district annexation election filed application to assume original jurisdiction and petition for

writ of mandamus for purpose of requiring state and local school officials to comply with their statutory duties in connection with implementation of annexation order. The Supreme Court, Williams, J., held that where proceedings leading to petition were begun on April 5, 1971, when petitioners filed original petition calling for school district election, and where new statute, which imposed no duty on State Board of Education to change school district boundary lines until after all litigation has expired, was not effective until July 2, 1971, law in effect at time proceedings were begun was controlling, and new statute did not bar issuance of writ of mandamus, even though other litigation involving the annexation was allegedly pending.

Application and writ granted.

1. Courts Key 207(4)

Because of the public nature of question presented, Supreme Court would assume original jurisdiction of petition for mandamus for purpose of requiring state and local school officials to comply with statutory duties in connection with implementation of annexation order issued pursuant to election favoring annexation of portion of one school district to another. 70 O.S.Supp.1968, §§ 7-1, 7-1(d).

2. Mandamus Key 5

Suit pending in federal district court and allegedly involving the deannexation and election proceedings in school district which electors had voted should be annexed to another school district did not represent a plain, speedy and adequate remedy for petitioners, who were among those who circulated original petition calling for annexation election and who sought writ of mandamus for purpose of requiring school officials to comply with statutory duties in connection with implementation of annexation order, such as would bar issuance of writ. 70 O.S.Supp.1968, §§ 7-1, 7-1(d).

3. Evidence Key 43(4)

Courts do not generally take judicial notice of proceedings in another cause in a different court.

4. Mandamus Key 172

Where proceedings leading to petition for writ of mandamus by persons seeking to require school officials to comply with statutory duties in connection with implementation of annexation order were begun on April 5, 1971, when petitioners filed original petition calling for school district election, and where new statute, which imposed no duty on State Board of Education to change school district boundary lines until after all litigation has expired, was not effective until July 2, 1971, law in effect at time proceedings were begun was controlling, and new statute did not bar issuance of writ of mandamus, even though other litigation involving the annexation was allegedly pending. 70 O.S.1971, § 7-101, subd. D; O.S.1971 Const. art. 5, § 54.

5 Mandamus Key 7

In awarding or denying writs of mandamus, courts exercise judicial discretion and are governed by what seems necessary and proper to be done under the facts of each case for the attainment of justice.

6. Mandamus Key 79

In absence of showing of good cause why annexation order, issued by county superintendent pursuant to school district election, should not be implemented, where work of several different agencies and instrumentalities of government would have to be coordinated in implementation of order, writ of mandamus would be granted and state and local school officials, respondents to petition, would be directed to proceed to perform their statutory duties and implement annexation. 70 O.S.Supp.1968, §§ 7-1, 7-1(d).

Application to assume original jurisdiction and petition for writ of mandamus filed by petitioners, to compel the respondents to perform their statutory duties in implementing an order declaring annexation issued pursuant to a school district election. Application and writ granted.

Barney Miller, Miller, Brockett, Granger & McConnel, Oklahoma City, for petitioners.

Leslie L. Conner, Conner, Little & Conner, Oklahoma City, for respondent, Independent School District No. I-53 of Oklahoma County.

Larry Derryberry, Atty. Gen., Larry L. French, Asst. Atty. Gen., Oklahoma City, for respondents, State Bd. of Education, and others.

James Howell, Oklahoma City, for respondent, Independent School District No. I-52 of Oklahoma County.

WILLIAMS, Justice.

Petitioners, Austin and Parker, et al., have filed an application to assume original jurisdiction and petition for writ of mandamus for the purpose of requiring respondents to comply with their statutory duties in connection with the implementation of an order declaring annexation issued by W. C. Haller, Oklahoma County Superintendent of Schools, pursuant to an election in which the school district electors voted to annex a portion of the Crooked Oak School District (I-53) to the Midwest City School District (I-52).

[1] Because of the public nature of the question presented, we have assumed original jurisdiction. State ex rel. Nesbitt v. Ford, Okl., 434 P.2d 934.

Petitioners herein were among those who circulated the original petition calling for the annexation election pursuant to the provisions of 70 O.S.Supp.1968, §§ 7-1. The county superintendent held that the petition contained an insufficient number of signatures and refused to call the

election. Petitioners herein then appealed to the District Court of Oklahoma County, which found the number of signatures sufficient and ordered the election held. Appeal was taken to this Court (case No. 45,028) and the judgment of the trial court was affirmed. Haller, Supt. v. Austin, et al., Okl., 487 P.2d 1360.

Following the election at which the annexation was approved, a number of people representing themselves to be more than 25% of the electors residing in the Crooked Oak School District (see 70 O.S.1968 Supp., § 7-1(d)) filed a petition in the District Court of Oklahoma County protesting the result of the election. That court found the number of protestants to be insufficient and dismissed the attempted appeal.

The same parties, represented by Mr. T., then filed a purported appeal in this Court, alleging, among other things, that

> "The sole and only question proposed by Plaintiffs in Error herein is, 'Did the 2nd trial Court err in accepting the records of the Oklahoma County Election Board, without deducting from that total the 272 names previously deducted by the 1st trial Court on May 26, 1971?' "

At the same time they filed an "Application for Stay in Proceedings" which was denied by this Court. Ten days later a similar application was filed. It was denied on Jan. 24, 1972, after the record from the trial court had been received and examined by this Court.

In the meantime, the application to assume original jurisdiction and petition for writ of mandamus which are presently under consideration had been filed in this Court by Austin and Parker, et al. Very shortly thereafter, the Crooked Oak School District (I-53) filed a petition for the removal of the matter from this Court to the United States District Court for the Western District of Oklahoma, al-

legedly under the provisions of 28 United States Code, §§ 1441(b) and 1443. After hearing argument, that court, on December 22, 1971, found that it was without jurisdiction and ordered the matter remanded to this Court. The order of remand was appealed by the Crooked Oak School District to the United States Court of Appeals for the Tenth Circuit. Thereafter, the school district applied to the appellate court for an injunction pending the appeal against most of the respondents herein, to prevent them from performing their statutory duties in implementing the described order declaring annexation. On February 17, 1972, the United States Court of Appeals entered it's order refusing to grant such an injunction.

In the answer brief opposing the granting of the petition for mandamus now before us, the Crooked Oak School District argues that relief should be denied because (1) the petition for mandamus was not verified; (2) there is a plain, speedy and adequate remedy at law because of other cases pending; and (3) under the new Oklahoma School Code adopted by the 1971 Legislature and effective July 2, 1971, no school district boundaries may be changed pursuant to an annexation election until "all litigation has expired."

The verification mentioned in (1) above has now been supplied by petitioners pursuant to 12 O.S.1971, §§ 1459 and 314.

[2, 3] In connection with (2) above, the brief lists three "cases pending." The first was No. 45192 in this Court; although it was pending when the brief was filed, it has now been terminated by the order of this Court, previously mentioned herein, entered on January 24, 1972. The second case mentioned is Civil No. 71-427, in the United States District Court for the Western District of Oklahoma, which allegedly "involves the deannexation and election proceedings in this school district." On this allegation, without more, we cannot say that the pending case in federal district court represents a plain, speedy and adequate remedy for

petitioners Austin and Parker, et al.; also, courts do not generally take judicial notice of proceedings in another cause in a different court; 29 Am.Jur.Evidence, § 58. The third case mentioned in the brief is No. 45344 in this Court —the one now under consideration. This case was apparently mentioned for the benefit of the federal district court in the removal proceedings, which considered the same brief.

[4] With regard to (3) above, respondent argues that the writ of mandamus should be denied because the State Board of Education has no duty to change school district boundary lines until "after all litigation has expired," as provided in 70 O.S.1971, § 7-101(D). As we have seen, however, this section, a part of the new Oklahoma School Code, was not effective until July 2, 1971. The proceedings leading to the petition for writ of mandamus now under consideration were begun on April 5, 1971, when petitioners herein filed their original petition calling for a school district election. This matter must therefore be determined in accordance with the law as it was at that time—70 O.S.Supp. 1968, § 7-1. The repeal of the 1968 statute cannot " * * * affect any * * * proceedings begun by virtue of such repealed statute." Art. 5, Sec. 54, Oklahoma Constitution.

Also, we note that the cases relied upon in the Crooked Oak School District brief as not having "expired" are the three cases mentioned in connection with the argument under (2) above which, as we have seen, constitute no bar to the granting of the relief petitioners seek.

[5, 6] No good cause is shown why the order declaring annexation, issued by the county superintendent pursuant to the school district election, as provided by statute, should not be implemented. There remains to be done only the ministerial duties placed upon respondents herein. However, it is readily apparent from the number, and official designation of the respondents in this case, that the work of several different agencies and instrumentalities of gov-

ernment must be co-ordinated in the implementation of the order declaring annexation, and that confusion could result from overly precipitous action. In awarding or denying writs of mandamus, courts exercise judicial discretion and are governed by what seems necessary and proper to be done under the facts of each case for the attainment of justice. See Draper v. St. Board of Equalization, Okl. 414 P.2d 276 (1966); and State ex rel. Settles v. Board of Education, et al., Okl. 389 P.2d 356, 358 (1964). It is therefore ordered that respondents and each of them are hereby directed to proceed to perform their statutory duties and thereby so implement the annexation that it shall become full effective on July 1, 1972.

BERRY, C. J., DAVISON, V. C. J., and JACKSON, IRWIN, LAVENDER, McINERNEY AND BARNES, JJ.

CERTIFICATE OF SERVICE

I hereby certify that the following who are all of the parties required by law to be served in the above case, were this day mailed three copies of the foregoing Petition for Writ of Certiorari, postage prepaid:

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DATED this 8th day of June, 1976.

Leslie L. Conner